Petition

81-1874

No.:

APR 9 1982

IN THE

Supreme Court of the United States

October Term, 1981

SENTINEL GOVERNMENT SECURITIES and
SENTINEL FINANCIAL INSTRUMENTS,

Petitioners,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the denial of a motion for the return of property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, made prior to "a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment" (*DiBella* v. *United States*, 369 U.S. 121, 131 (1962)), is immediately appealable as a final decision, as held by the Sixth, Seventh, Eighth and Tenth Circuits, or not, as held by the First, Third, Fourth, Fifth, Ninth and Eleventh Circuits, and the Second Circuit in this case?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Sentinel Government Securities ("SGS") and Sentinel Financial Instruments ("SFI") (collectively "Sentinel") respectfully request that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered on April 7, 1982, dismissing, for lack of jurisdiction, petitioners' appeal from the district court's denial of a pre-indictment motion for return of property made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

Opinions Below

The order of the Court of Appeals for the Second Circuit dismissing petitioners' appeal is unreported and appears in Appendix A hereto. The memorandum opinions and orders of the District Court for the Southern District of New York are also unreported and appear in Appendix B and Appendix C hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was filed on April 7, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 28:

§ *1291. Final decisions of district courts*

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code, Title 18, Rules of Criminal Procedure:

Rule 41(e). Motion for Return of Property.

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Statement of the Case

Petitioners are partnerships conducting business as brokers, dealers and market makers in money market instruments and government securities. Their joint premises at 100 Wall Street, New York, New York, were the subject of a massive 12-hour search in connection with an ongoing criminal investigation of which petitioners are targets. Prior to the search, SGS was one of the major dealers in money market instruments and government securities from which the Federal Reserve Bank of New York regularly receives trading reports. The search of and massive seizure from Sentinel's premises left the firms unable to operate their normal businesses. To this day, they are functioning only with great difficulty.

Because the warrants authorizing the search permitted the search and seizure of literally every business record of Sentinel,* petitioners moved in the United States District

*The agents conducting the search were armed with two search warrants, one for SGS and the other for SFI. The search warrant for SGS authorized the agents to seize:

> *All documents and records evidencing the trading and business activities of Sentinel Government Securities from June 1, 1980 through 6/30/1981* including all customer files, customer cards, account applications and agreements, correspondence, daily, monthly and year end statements to customers, customer target tax losses, fees paid, confirmation slips and buy and sell tickets for customer and firm trading, any blank buy and sell tickets which

Court for the Southern District of New York, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for return of property they contended had been seized pursuant to unconstitutional general warrants.

Despite its ruling that Sentinel had indeed raised "substantial questions" as to the validity of the warrants, the district court declined to reach the merits of Sentinel's Rule 41(e) motion. Instead, the district court held (1) that Sentinel had an obligation to demonstrate that the denial of its motion would cause it irreparable injury, and (2) that Sentinel had failed to meet that obligation because the government had offered to supply Sentinel with copies of Sentinel's own documents. The district court relied in large part for this ruling on dictum concerning irreparable injury in the Second Circuit's opinion in *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156 (2d Cir.), *petition for cert. filed*, 50 U.S.L.W. 3635 (U.S. Feb. 4, 1982)(No. 81-1492); the holding of *Standard Drywall* was that denial of a Rule 41(e) motion made by the target of an ongoing investigation is not appealable as a final decision under 28 U.S.C. § 1291.

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have been timestamped, daily transaction ledgers, general ledgers and subsidiary ledgers, general journals, bank statements, cancelled checks, deposit tickets, debit and credit memos, lists of customers, salesmen, promoters and employees, general and limited partners, payroll records, correspondence, internal operations memoranda, diaries, placement memoranda, program descriptions, credit reports, credit statements, list of assets, inventory records, any accounting reports, certified or qualified financial statements, accountants' opinions, accountants' workpapers and any correspondence from or to accountants and any computer tapes containing the items mentioned above *which are evidence and instrumentalities of the commission of the federal crimes of tax evasion, filing false tax returns, assisting the filing of false returns* (26 U.S.C. §§ 7201, 7206(1), (2)), *mail fraud and conspiracy* (18 U.S.C. §§ 1341 and 371). [Emphasis added.]

The warrant for SFI was identical except that the time frame was broader—1978 through June 30, 1981.

The United States Court of Appeals for the Second Circuit, on April 7, 1982, dismissed Sentinel's appeal from the denial of its Rule 41(e) motion on the authority of *Standard Drywall*. Believing that the Second Circuit—and the six other courts of appeals that have ruled the same way—have misinterpreted *DiBella* v. *United States*, 369 U.S. 121 (1962), and that the four courts of appeals that have ruled that pre-indictment denials of Rule 41(e) motions are appealable as final decisions are correct, Sentinel petitions this Court for a writ of certiorari.

Additional details concerning the proceedings in the lower courts are set forth below.

A. Proceedings in the District Court

On December 10, 1981, SGS and SFI moved in the district court, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for return of the material seized from their premises on November 17 and 18 in the course of a 12-hour search by approximately 40 government agents. SGS and SFI maintained that the search warrants, rather than "particularly describing the . . . things to be seized," as required by the Fourth Amendment, were—because they authorized seizure of every business record—precisely the type of "general warrants" that the Amendment was enacted to prohibit.* The government opposed Sentinel's motion, primarily on the ground that a movant under Rule 41(e) must

*See, e.g., *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325 (1979); *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976); *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); *Marron* v. *United States*, 275 U.S. 192, 196 (1927); *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980); *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980); *In re Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *VonderAhe* v. *Howland*, 508 F.2d 364, 369 (9th Cir. 1974); *United States* v. *Cangiano*, 464 F.2d 320, 325-26 (2d Cir. 1972), *vacated on other grounds*, 413 U.S. 913 (1973), *aff'd on remand*, 491 F.2d 905 (2d Cir. 1973), *cert. denied*, 418 U.S. 934 (1974); *United States* v. *Marti*, 421 F.2d 1263, 1268 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971).

show irreparable injury before it can obtain relief. In reply, Sentinel argued that a party properly moving under Rule 41(e) claiming a violation of the Fourth Amendment did not have to make a showing of irreparable harm, but that if it did, such a showing was amply made here in view of the Second Circuit's holding in *In re Fried*, 161 F.2d 453 (2d Cir.), *cert. dismissed*, 332 U.S. 807 (1947), that irreparable injury exists when there is the danger of an indictment based upon unconstitutionally seized evidence.

On January 5, 1982, the district court filed a Memorandum Opinion and Order (the "Initial Order") in which it stated (Appendix C at C-1) that "[t]he generality of the warrants gives rise to substantial questions" and asked for further briefs from the parties on several questions concerning the merits of Sentinel's contention that the search warrants and the resulting search were unconstitutional. No mention was made of the government's contention that the district court could not even reach the merits unless Sentinel demonstrated irreparable harm. On January 15, 1982, Sentinel and the government each submitted to the district court briefs addressing the specific questions raised in the Initial Order.

On January 28, 1982, the district court issued its Memorandum Opinion and Order (the "Order") denying Sentinel's Rule 41(e) motion. The district court repeated that Sentinel had raised "[s]ubstantial questions" as to the legality of the warrants and search. Appendix B at B-3. The Court declined to determine those questions, however, in part based on its belief that the recent opinion in *Standard Drywall, Inc.* v. *United States, supra* — in which the Second Circuit held that an order denying a Rule 41(e) motion is not appealable — required denial of Sentinel's motion on the ground that Sentinel had failed to demonstrate "irreparable harm entitling [it] to relief under Rule 41(e)." Appendix B at B-7.

Specifically, the district court focused on the following dictum in a footnote in the *Standard Drywall* opinion:

> We seriously question whether, in the absence of seizure of some unique property or privileged documents, a party could ever demonstrate irreparable harm when the Government either provides the party with copies of the items seized or returns the originals to the party and presents the copies to the jury.
>
> —668 F.2d at 157 n.2

The district court believed this footnote to be "pertinent to the case at bar because a comparable offer has been made by the Government to SGS and SFI." Appendix B at B-5. Although the parties' briefs had addressed the issue of irreparable injury, neither party had an opportunity to discuss *Standard Drywall* in its papers prior to the Order (since the Second Circuit opinion was filed on the date of the district court's Initial Order requesting additional briefs addressed to questions unrelated to the irreparable injury issue).

On February 5, 1982, Sentinel moved for reargument (or for certification for appeal pursuant to 28 U.S.C. § 1292(b)). On March 10, 1982, the district court denied Sentinel's motion by an endorsement on the notice of motion that the motion was "denied in all respects"; it gave no reason for its action.

B. Proceedings in the Court of Appeals

On March 22, 1982, Sentinel filed a notice of appeal from the Order and from the district court's denial of Sentinel's motion for reargument or certification.* Recognizing that

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* Sentinel also filed on March 22 a petition for a writ of mandamus to require the district court to vacate its orders and decide the merits of Sentinel's Rule 41(e) motion. Sentinel's mandamus petition is addressed to the question of whether the district court could properly refuse to reach the merits of Sentinel's Rule 41(e) motion and not to the question of the motion's appealability, which is the subject of this

the Second Circuit's decision in *Standard Drywall, supra*, had rendered those orders non-appealable in that circuit, Sentinel represented that it had filed a notice of appeal for jurisdictional purposes so that it could petition this Court for a writ of certiorari in order to press its view that *Standard Drywall* had been wrongly decided. Sentinel's appeal was dismissed by the Second Circuit, upon motion by the government, on April 7, 1982, on the authority of *Standard Drywall*.

Reasons for Granting the Writ

I

The Decision Below Is Directly and Expressly in Conflict with the Decisions of Four Other Courts of Appeals as to the Proper Interpretation of *DiBella* v. *United States*.

This Court has historically recognized the appropriateness of exercise of its certiorari jurisdiction in cases where a conflict has developed among the courts of appeals on matters relating to federal appellate jurisdiction or administration of the Federal Rules of Criminal Procedure, where uniformity is necessary. *E.g., Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 153 (1972); *United States* v. *Robinson*, 361 U.S. 220, 222 (1960). This is such a case.

The instant case, like *Standard Drywall* (in which a petition for a writ of certiorari is currently pending before this Court*), presents the issue of how properly to apply *DiBella* v. *United States, supra*, to the question of the appealability of the denial of a Rule 41(e) motion for return of property unlawfully seized when that motion is made and

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certiorari petition. On April 7, the Second Circuit ordered the government to file an answer to Sentinel's mandamus petition by April 28, 1982.

* Should this Court grant a writ of certiorari in both this case and *Standard Drywall*, Sentinel respectfully suggests that the cases be consolidated pursuant to Rule 37.3 of the rules of this Court as cases involving the same question.

denied prior to the institution of any criminal prosecution against the movant.

In *DiBella*, this Court held that a suppression motion that is ruled on when "there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment . . . must be treated as 'but a step in the criminal case preliminary to the trial thereof,' " 369 U.S. at 131; thus the denial of such a motion was not an appealable final decision. On the other hand, a motion "solely for the return of property and . . . in no way tied to a criminal prosecution *in esse* against the movant" was held to be an independent proceeding, the denial of which would be an appealable final decision. *Id.* at 131-32.

The courts of appeals have divided on the meaning of "criminal prosecution *in esse*." The Sixth, Seventh, Eighth and Tenth Circuits have accepted the *DiBella* listing (complaint, detention or release on bail following arrest, arraignment, information or indictment) as a complete description of a criminal prosecution *in esse*, and have accordingly permitted immediate appeals from denials of Rule 41(e) motions made by movants against whom no criminal charges have formally been made. *See Coury* v. *United States*, 426 F.2d 1354, 1355 (6th Cir. 1970); *United States* v. *One Residence & Attached Garage, etc.*, 603 F.2d 1231, 1234 (7th Cir. 1979); *United States* v. *Alexander*, 428 F.2d 1169, 1171 (8th Cir. 1970); *Gottone* v. *United States*, 345 F.2d 165 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965).

The Second Circuit in *Standard Drywall* and the instant case, on the other hand, has joined the First, Third, Fourth, Fifth (and hence Eleventh*) and Ninth Circuits in rejecting the *DiBella* list. They have substituted for it the more nebulous standard that a Rule 41(e) motion made by the subject of

* Precedents of the former Fifth Circuit have been adopted as binding by the present Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981).

an investigation prior to the institution of any formal charges is a part of a criminal prosecution *in esse*, and have thus held non-appealable the denial of a Rule 41(e) motion made by the subject of such an investigation. *See Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 894-96 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); *In re Grand Jury Proceedings (FMC Corporation)*, 604 F.2d 806, 807 (3rd Cir. 1979); *Parrish* v. *United States*, 376 F.2d 601, 603-04 (4th Cir. 1967) (concurring opinion); *Simons* v. *United States*, 592 F.2d 251, 252 (5th Cir.), *cert. denied*, 444 U.S. 835 (1979); *Church of Scientology of California* v. *United States*, 591 F.2d 533, 535-37 (9th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

Sentinel is aware that the government, in its brief in opposition to Standard Drywall, Inc.'s petition for a writ of certiorari, takes the position (at p. 6) that there is no genuine conflict among the circuits because "the courts have been generally consistent in recognizing that once a grand jury has been summoned, such a denial [of a Rule 41(e) motion] is not a final order appealable under 28 U.S.C. 1291." There has in fact been no such general recognition by the courts of appeals, and the disagreement among them is direct, explicit and fundamental.

This disagreement was recognized by the Second Circuit itself, in its *Standard Drywall* opinion, when it noted that "[t]he Circuits have divided on the proper interpretation of *DiBella* in situations like the one before us where the movant seeking return of seized property has been neither indicted, arrested, nor otherwise had criminal proceedings formally instituted against him." 668 F.2d at 158.

Moreover, as the government is constrained to concede (at p. 7 of its opposing brief), the Seventh Circuit in *One Residence & Attached Garage, supra*, 603 F.2d at 1232, did permit appeal from the denial of a Rule 41(e) motion made while a grand jury was sitting. The government attempts to explain the Seventh Circuit opinion away by asserting that

that court's justification for allowing the appeal was that the property seized was in no way tied to the grand jury proceeding—which the government insists was the "criminal prosecution *in esse*" against the movant. This contention is not borne out by an examination of the Seventh Circuit's opinion: that court entertained an appeal on its merits from the denial of a Rule 41(e) motion not only (as the government contends) with respect to the cash seized, which was not linked to a grand jury investigation, but also with respect to other items of property seized, which were held to be so linked, 603 F.2d at 1233-35. On the issue of appealability, as to which Judge Swygert concurred with the author of the court's opinion, the majority of the panel agreed that the appellant could appeal the denial of his motion with respect to *all* items of property seized, for the reason (stated by Judge Swygert) that "no . . . accusatory event" such as those enumerated in *DiBella* had taken place (603 F.2d at 1235)—a view diametrically opposed to that adopted by the Second Circuit in *Standard Drywall* and the instant case.

Finally, the distinction the government seeks to draw—hinging on whether a grand jury has been summoned—is not supported by the opinions of other circuits permitting immediate appeals from denials of pre-indictment Rule 41(e) motions. An examination of the Sixth, Eighth and Tenth Circuit authorities cited does not reveal conclusively, one way or the other, whether a grand jury was involved in the criminal investigations pending in those cases. What is clear, however, is that the opinions in those cases, in permitting immediate appeals, nowhere draw the distinction that the government relies on in this Court.

The government's true position is revealed at page 5 of its brief, in which it opposes "full litigation of a Rule 41(e) motion made while active investigation of suspected crimes is underway." The government's position—that denial of a Rule 41(e) motion made during the pendency of a criminal

investigation of any sort is non-appealable—has been accepted by seven courts of appeals. But it has been explicitly rejected by four other courts of appeals. This real and virtually total split among the circuits (only the District of Columbia Circuit has not spoken) on an important matter of federal procedure should be resolved by this Court.

II

Elimination of the Right to Appeal From Denials of Rule 41(e) Motions Is Inconsistent With *DiBella* and Is Not Required By Any Policy Against Interference With Grand Jury Proceedings.

As noted above, the starting point for an analysis of whether the denial of a Rule 41(e) motion is an appealable final decision is this Court's holding in *DiBella*:

> We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. . . . Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.
>
> — 369 U.S. at 131-32

According to the Second Circuit, the existence of an ongoing grand jury investigation amounts to a "criminal prosecution *in esse*." The considerations that made the lower court rulings in *DiBella* non-appealable do not, however, support the Second Circuit's view. In *DiBella*, formal criminal prosecutions had been initiated — by issuance of criminal complaints and arrest warrants — against the movants before the motions to suppress were made, and the movants were indicted before the district courts heard the motions. At the time of the appeals, therefore, there were in existence

ongoing criminal prosecutions in which the suppression issues could be considered, both by the district courts and by the circuit courts on direct appeal from a final judgment. *See* 369 U.S. at 126-27.

That rationale does not apply, however, until a prosecution has moved from the investigatory to the accusatory stage — as had occurred in *DiBella*. This Court established that distinction when, immediately prior to pronouncing the "criminal prosecution *in esse*" rule quoted above, it stated:

> When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment — *in each such case* the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." *Cogen* v. *United States*, 278 U.S. 221, 227.
>
> — 360 U.S. at 131 (emphasis supplied)

That distinction was also viewed as crucial in *United States* v. *One Residence & Attached Garage, supra*. In that case, Judge Swygert, in his opinion concurring on the issue of appealability, relied upon the language quoted above in concluding that the Seventh Circuit had jurisdiction over an appeal from a denial of a pre-indictment Rule 41(e) motion:

> Accordingly, *because no criminal charges have yet been filed in the instant case, there is no prosecution in esse*; the criminal process is at best in the investigatory stage. . . . The *DiBella* opinion itself supports this determination.
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> — 603 F.2d at 1235 (emphasis supplied)

See also United States v. *MacDonald*, 50 U.S.L.W. 4347, 4350 (U.S. March 31, 1982) (defendant "not subject to any 'criminal prosecution' " prior to arrest or indictment despite pendency of criminal investigation and presentation to grand jury).

In opposing the petition for a writ of certiorari in *Standard Drywall*, the government — apparently recognizing that *DiBella* and this Court's reasoning in that case do not support the Second Circuit's position — argues primarily that the Second Circuit's holding should be upheld for reasons of policy. The Second Circuit held in *Standard Drywall* — and the government agrees — that when a Rule 41(e) movant "is the subject of a grand jury inquiry, allowance of an appeal from denial of the motion would interfere with the grand jury proceedings." 668 F.2d at 158 (footnote omitted); *see* Brief for the United States in Opposition in *Standard Drywall* at 4-6. Support for this position is sought in *United States* v. *Calandra*, 414 U.S. 338 (1974).

In fact, permitting an immediate appeal from the denial of a Rule 41(e) motion would in no way interfere with grand jury proceedings. What was held in *Calandra* was that it was improper to interrupt a grand jury proceeding by subjecting each question put to a witness to scrutiny to determine whether the question was based on illegally seized evidence. In contrast to the direct and substantial interference with the grand jury that such a procedure constitutes, an appeal from the denial of a Rule 41(e) motion represents no interference at all. The appeal will go forward as a totally independent proceeding. The grand jury can continue to hear whatever testimony and to consider whatever documents it wishes regardless of the appeal, because, in view of *Calandra*, the outcome of the appeal would have no effect on the legal sufficiency of any indictment the grand jury may decide to return: the indictment may be returned on the basis of illegally seized evidence.

Contrary to the government's position, the efficiency of the grand jury and trial process is likely to be fostered rather than hindered by permitting an immediate appeal from the denial of a Rule 41(e) motion. A prompt appeal resulting in a determination that a search was illegal may cause the government not to seek an indictment in a case that ultimately

could not result in a conviction because the material seized could not be used at trial. The judicial system would thus be spared the proceedings leading to an indictment and possibly a trial in a case tainted from its inception by an illegal search. A determination that a search was legal, upheld on appeal, may well result in prompt dispositions if an indictment is handed down, also avoiding unnecessary trials.

The mere "summoning of a grand jury" is also not (as the government contends at pp. 4-5) the kind of formal bench mark of the prosecutorial process that should automatically cut off appellate review until the government is able to obtain a conviction (assuming there is an indictment). Government investigations are often conducted outside the grand jury — especially extended investigations (such as the one in the instant case) of supposed "white collar" crime — with the grand jury (indeed, often more than one grand jury) being used intermittently as a mechanism to compel production of documents and testimony as desired by the government. To accept the government's argument would allow it to frustrate appellate review of a Rule 41(e) motion merely by issuing a single grand jury subpoena and declaring that the grand jury has been "summoned," when in fact such "summoning" of the grand jury has little real significance to the status of the investigation and has no prosecutorial significance unless and until an indictment is returned.*

* Moreover, abolishing the right to appeal because of the government's talismanic declaration that a grand jury has been "summoned" would allow the government to retain seized property for an indefinite period of time. Once a district court has denied a motion for return of property, the subject of the search, if denied appellate review, has no further remedy and, since uncompleted investigations may be transferred from one grand jury to another, may have to wait even longer than the eighteen-month life of any one grand jury before regaining possession of his property. Such a delay in relief is unconscionable, particularly when, as in the instant case, denial of the Rule 41(e) motion is not on the merits, and, indeed, the district court states that the motion raises "substantial questions" about the legality of the search.

Furthermore, postponement of appellate review until after indictment may well impose a severe and irreparable injury on the subject of the search. In the instant case, should Sentinel be indicted on the basis of material seized in the search, and should a court later rule that the search was, indeed, unconstitutional, it will be too late to undo the damage of the indictment. Perhaps the classic statement of the irreparable harm facing Sentinel as a result of the Second Circuit's refusal to review the denial of Sentinel's Rule 41(e) motion is contained in Judge Frank's opinion for the Second Circuit in *In re Fried*, 161 F.2d 453 (2d Cir.), *cert. dismissed*, 332 U.S. 807 (1947):

> The government further argues that an indictment founded upon such illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. That is an astonishingly callous argument which ignores the obvious. *For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased.* In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrong-doing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal. Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputations. That discretion is almost completely unfettered. It should surely not extend so far as to preclude judicial interference with a prosecutor's aim to induce an indictment by offering to a grand jury evidence which is the product of illegal acts of federal officers.
>
> — 161 F.2d at 458-59
>
> (footnotes omitted) (emphasis supplied)

Accord, Pieper v. *United States*, 604 F.2d 1131, 1134 (8th Cir. 1979); *Richey* v. *Smith*, 515 F.2d 1239, 1243 n.10 (5th Cir. 1975). Only permitting immediate appellate review to one in Sentinel's position will prevent that injury.*

Finally, as for the concern expressed by the government (at p. 4 of its brief) that motions for return of property are really suppression motions in disguise, it should be emphasized that two motions can be distinct from one another and yet still have the same ultimate result. The fact that a successful constitutionally-based motion for return of property has the effect of suppressing evidence does not mean that there is no difference between a motion for return of property and a motion to suppress. The collateral effects of a Rule 41(e) motion become relevant only if an indictment is ultimately returned. If a grand jury decides not to indict, all

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* The harm to petitioners is pointed up by this Court's decision in *United States* v. *Calandra, supra.* In rejecting the contention that a grand jury witness need not respond to questions based on material seized in violation of the Fourth Amendment, this Court held that Calandra was nonetheless not left without remedy: "*He may . . . seek return of the illegally seized property*, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial." 414 U.S. at 354-55 n.10 (emphasis supplied) (*citing Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931) (no information or indictment having been returned, application for return of papers appealable even though petitioners were targets of investigation), which, in turn, relied on *Cogen* v. *United States*, 278 U.S. 221, 225 (1929) (Brandeis, *J.*) ("The independent character of the summary proceedings is clear . . . wherever the motion is filed before there is any indictment or information against the movant . . . ."). There is no suggestion in *Calandra* that the remedy this Court was offering with one hand it was taking away with the other by setting up an insuperable barrier to review of denials of Rule 41(e) motions. Indeed, if *Calandra* were *not* the law — that is, if a grand jury were barred from considering illegally seized evidence — the need for immediate appellate review would lose much of its urgency and *In re Fried, supra*, would lose much of its rationale, since there would no longer be a danger that the grand jury would return an indictment based on such illegally seized evidence. It is precisely because *Calandra* is the law — because a grand jury *may* use illegally seized evidence — that *In re Fried* retains its vitality and denials of pre-indictment Rule 41(e) motions must be appealable final decisions.

congressionally mandated opportunity to litigate the validity of a questioned search and seizure will have been lost — for there will never be a suppression hearing — and the movant will have been deprived unfairly of his property for an extended period of time.

* * *

In sum, if certiorari is not granted and *Standard Drywall* and the instant case are not reversed: (1) the deep and fundamental split among the courts of appeals on the issue of appealability will remain unresolved; and (2) in the Second Circuit and the circuits that agree with it, a pre-indictment Rule 41(e) motion by a subject of a criminal investigation will, in effect, have been eliminated, no matter how egregiously unconstitutional the search and seizure. As happened in the instant case and in *Standard Drywall*, the district court will refuse to consider the merits — no matter how substantial they may be — of the motion (provided the government offers the movant copies of his own documents). And the court of appeals will then refuse to hear an appeal from that decision. Only after an indictment is returned — with its devastating impact — would the subject of a search be able to seek return of his property, and only after a conviction is obtained would he be able to secure appellate review. The effective elimination of a pre-indictment Rule 41(e) motion (including the right to appeal from the denial of such motion) for subjects of a criminal investigation is consistent neither with *DiBella* nor with the clear language of Rule 41(e) (which expressly authorizes a pre-indictment motion), and it is not required by any policy against interference with grand jury proceedings. Certiorari should be granted.

Conclusion

For the foregoing reasons, it is hereby respectfully submitted that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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On the Brief

April 9, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed April 7, 1982

No. 82-6066

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April, one thousand nine hundred and eighty-two.

Present: HONORABLE HENRY J. FRIENDLY,
HONORABLE JON O. NEWMAN,
Circuit Judges.

HONORABLE JOHN T. CURTIN,*
District Judge.

SENTINEL GOVERNMENT SECURITIES and
SENTINEL FINANCIAL INSTRUMENTS,

Appellants,

-against-

UNITED STATES OF AMERICA,

Appellee.

ORDER

Sentinel Government Securities and Sentinel Financial Instruments, brokers and dealers in money market instruments and government securities, appeal from a January 28, 1982 order of the District Court for the Southern District of

* Of the United States District Court for the Western District of New York, sitting by designation.

New York (Charles S. Haight, Jr.), denying their motion for return of property seized in the execution of a search warrant. Judge Haight concluded that the appellants are "targets in an ongoing grand jury investigation" and that they "have not demonstrated irreparable harm entitling them to relief under Rule 41(e)" of the Federal Rules of Criminal Procedure. He therefore denied the Rule 41(e) motion "without prejudice to a later reassertion of the underlying Fourth Amendment claims if the grand jury returns an indictment." He also denied a motion for reargument, which alleged that the seized items included documents protected by the attorney-client privilege.

The Government moves to dismiss the appeal, relying on our recent decision in *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156 (2d Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3635 (No. 81-1492 Feb. 4, 1982). We there held that a pre-indictment denial of a Rule 41(e) motion brought by a target of a grand jury investigation was not an appealable order. Appellants do not dispute the applicability of *Standard Drywall* to the circumstances of their appeal, although they challenge the correctness of its holding of non-appealability.

Applying *Standard Drywall*, we grant the Government's motion and dismiss the appeal for lack of jurisdiction.

HENRY J. FRIENDLY

JON O. NEWMAN
Circuit Judges.

JOHN T. CURTIN
District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
M9-150

In the Matter of the Application of
Sentinel Government Securities and
Sentinel Financial Instruments to
Direct the Return of Seized Property.

MEMORANDUM OPINION AND ORDER

APPEARANCES:

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Of Counsel.

HAIGHT, *District Judge:*

Movants Sentinel Government Securities ("SGS") and Sentinel Financial Instruments ("SFI") apply pursuant to Rule 41(e), F.R.Crim.P.,[1] for an order directing the return of property seized under warrant. For the following reasons the motion is denied.

SGS and SFI are brokers and dealers in money market instruments and government securities. Certain aspects of their operations have attracted the interest of the Internal Revenue Service. SFI is presently the target of a grand jury inquiry into whether it has engaged in a widespread false trading operation, manufacturing documents so that customers could reduce their income tax liability by means of apparent "straddles." SGS is the target of an inquiry into comparable falsification of documents in order to provide tax losses to its limited partners. The grand jury investigations were triggered by information received from a confidential informant in a position to furnish the Government with detailed descriptions of the companies' activities. No indictments have as yet been voted.

On November 17, 1981 a number of IRS agents executed search warrants issued by a magistrate of this Court and removed numerous files from the SFI and SGS offices at 100 Wall Street in Manhattan.

SGS and SFI attack the search warrants as general warrants, violative of the Fourth Amendment as construed in such cases as *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976); *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965), quoting *Marron* v. *United States*, 275 U.S. 192, 196 (1927); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325 (1979); *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980); *Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980); *VonderAhe* v. *Howland*, 508 F.2d 364, 369 (9th Cir. 1974) (*per* Leonard Moore, Ct. J., sitting by

designation); and *United States* v. *Marti*, 421 F.2d 1263 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971). The Government argues that its seizure of these quantities of business records, in execution of the warrants in the forms issued, is sanctioned by *National City Trading Corp.* v. *United States*, 635 F.2d 1020 (2d Cir. 1980), and *United States* v. *Brien*, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980). Movants respond that these latter cases apply only where the activities of the entity whose documents are seized are entirely illicit, so that there is no basis for segregating between legitimate and illegitimate documentation, whereas in the case at bar, assuming *arguendo* illegal operations, there is also undisputed evidence of substantial legal operations by SGS and SFI, and the documents sought for use in the ongoing grand jury investigation are segregable from those documents that are not.

Able briefs of counsel were filed on the original motion, and counsel have responded with equal skill to particular questions put by the Court in its memorandum opinion of January 5, 1982. Substantial questions arise which, in the event of an indictment, will require decision by the trial court within the context of a motion to suppress under Rule 12(b), F.R.Crim.P. But my reading of the Second Circuit's most recent authority considering Rule 41(e), *Standard Drywall, Inc.* v. *United States*, No. 81-2261 (2d Cir., decided January 5, 1982), persuades me that these issues need not and should not be reached at this time.[2]

In *Standard Drywall*, federal agents executed a warrant to search the offices of that company, and seized various books and records for presentation to a grand jury that was investigating criminal violations allegedly committed by Standard Drywall and other companies in the construction industry. Prior to an indictment being voted upon, Standard Drywall filed a motion under Rule 41(e) for the return of all

its property seized pursuant to the search warrant, alleging violation of Fourth Amendment protections. Judge Bramwell of the Eastern District of New York denied Standard Drywall's motion, relying on *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F.Supp. 863, 866 (D.Minn. 1979), for the proposition that Standard Drywall was required to demonstrate that it would suffer irreparable harm if the documents seized were not returned at once, and had failed to do so. In that connection, the Government offered to provide to Standard Drywall copies of all the documents seized from its offices. Judge Bramwell viewed this offer as undermining Standard Drywall's contention that it could not conduct business without these documents, thereby refuting any claim of irreparable harm. In these circumstances, Judge Bramwell reasoned (as paraphrased by the Second Circuit at slip op. 689) that the district court "need not balance any violation of Standard Drywall's Fourth Amendment rights against the need of the grand jury to consider all relevant evidence." Judge Bramwell postponed consideration of the merits of the Fourth Amendment claim "until such time as the initiation of a criminal proceeding necessitates such consideration in connection with a motion to suppress, brought under Rule 12(b) (3)," *ibid.*

Standard Drywall sought to take an appeal from Judge Bramwell's order. The Second Circuit held that the order was not appealable. It reached that conclusion by construing *DiBella* v. *United States*, 369 U.S. 121, 131-32 (1962), to limit appeals from orders denying pre-indictment Rule 41(e) relief to motions "for return of property brought by a movant with no connection to either an actual or potential criminal case, a person not suspected of anything who happened to have on his premises property pertinent to an investigation or prosecution of someone else," slip op. at 691-92. Because Standard Drywall did not fit within that category, the order denying its Rule 41(e) motion was not appealable.

In view of the Second Circuit's jurisdictional holding in *Standard Drywall*, it did not reach the merits of Judge Bramwell's ruling that, at least in the context of a pre-indictment motion, the movant must demonstrate irreparable harm. I am, therefore, at liberty to agree with Judge Bramwell's rationale, as well as that of Chief Judge Devitt in *Berkley & Co., supra*, upon which Judge Bramwell relied. In point of fact, I do so agree, since I find persuasive the reasoning of Judge Devitt, fully expressed in *Berkley* at 466 F.Supp. 866-67, and that of Judge Bramwell, as paraphrased by the Second Circuit in *Standard Drywall*. But the Second Circuit in *Standard Drywall*, addressing one aspect of the merits at least inferentially, observed with respect to the "irreparable harm" question at slip op. 689 n.2:

> "We seriously question whether, in the absence of seizure of some unique property or privileged documents, a party could ever demonstrate irreparable harm when the Government either provides the party with copies of the items seized or returns the originals to the party and presents the copy to the jury."

That footnote is pertinent to the case at bar because a comparable offer has been made by the Government to SGS and SFI, an offer which, the record indicates, has been at least partially implemented. It also appears from the record that although SFI and SGS understandably profess difficulties in doing so, the companies have in fact been able to continue doing business.

The Second Circuit's language in *Standard Drywall* is also significant, in my judgment, because of the reasons assigned for non-appealability of pre-indictment Rule 41(e) motions. Judge Newman wrote:

> "We think the cases that have dismissed appeals by those under investigation, even in the absence of a

> pending criminal prosecution, have correctly applied the principles of *DiBella*. Where, as here, the party moving for return of seized property is the subject of a grand jury inquiry, allowance of an appeal from denial of the motion would interfere with the grand jury proceedings, *see United States v. Calandra*, 414 U.S. 338, 349-50 (1974), and permit piecemeal appeals, *see Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Plainly this is not a case, of the sort contemplated in *United States v. Ryan*, 402 U.S. 530, 533 (1971), where denial of review 'would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.' The term of the grand jury is limited. If its inquiry results in indictment, the lawfulness of the seizure will be fully considered upon a motion to suppress, and any ruling adverse to the defendant will be reviewable upon appeal from a final judgment; if the grand jury declines to indict the movant, or adjourns without indicting it, its property will most likely be returned, and if not, it can initiate an independent proceeding for its return. *Cf. Dickhart v. United States*, 16 F.2d 345 (D.C.Cir. 1926) (motion for return of seized property after search warrant quashed and defendant discharged)." Slip op. at 691 (footnotes omitted).

Just as allowance of an appeal from denial of a motion "would interfere with the grand jury proceedings," so would granting of the motion itself, a consideration stressed by Judge Devitt at the district court level in *Berkley & Co.*, *supra*, in a comparable analysis which also relied upon *Calandra*:

> "There is a second important reason why this court should not rule on Berkley's motion to suppress at the present time. The Rule 41(e) motions brought in Iowa

and in this court already have delayed the grand jury investigation for one month, and if this court considered the merits of Berkley's motion, a further delay would occur. The Supreme Court in *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), in holding that the exclusionary rule does not apply to grand jury proceedings, made clear that grand jury investigations must not be impeded by minitrials and preliminary hearings on Fourth Amendment questions. *Id.* at 349-52, 94 S.Ct. 613. That has also long been the policy in this circuit. *See Truchinski v. United States*, 393 F.2d 627 (8th Cir. 1968); *West v. United States*, 359 F.2d 50 (8th Cir. 1966). Thus a further delay of the grand jury investigation to decide Berkley's Rule 41(e) motion is impermissible." 466 F.Supp. at 866-67.

I hold that on the facts of this case, SGS and SFI, as targets in an ongoing grand jury investigation, have not demonstrated irreparable harm entitling them to relief under Rule 41(e); and that consideration of their Fourth Amendment claim should await the return of an indictment (if that comes to pass), at which time the claim will take the form of a motion to suppress under Rule 12(b) (3).

I am mindful of the present movants' contention that the return of an indictment, based upon unconstitutionally seized evidence, would constitute irreparable harm in and of itself. Movants argue (reply brief at 21) that "the classic statement of the irreparable harm facing Sentinel as a result of the government's illegal search" was articulated by Judge Frank in *In re Fried*, 161 F.2d 453, 458-59 (2d Cir.), *cert. dismissed*, 332 U.S. 807 (1947). In *Fried* the Second Circuit reversed in part the district court's order denying an application for relief under Rule 41(e). Judge Frank described the stigmatizing effect of an indictment, and stated that

prosecutorial discretion in the institution of criminal proceedings "should surely not extend so far as to preclude judicial interference with a prosecutor's aim to induce an indictment by offering to a grand jury evidence which is the product of illegal acts of federal officers."

It is not entirely clear how closely the facts of *Fried* resemble those in the case at bar, where the grand jury investigation into SFI's and SGS's activities were triggered by the revelations of a well-placed confidential informant, prior to the execution of the search warrant giving rise to the instant motions. In *Fried*, the search and seizure complained of were contemporaneous with the arrest of the movant by FBI agents upon a warrant issued on a verified complaint. See *Application of Fried*, 68 F.Supp. 961, 962 (S.D.N.Y. 1946). "No action had then been taken before a grand jury with respect to appellants; nor has there been any since then." *In re Fried, supra*, at 161 F.2d 453. *Fried* may, therefore, be distinguishable on the facts. It is also worth noting that Judge Frank's opinion elicited a rather grudging concurrence, "upon a very limited ground," from Judge Learned Hand ("The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten." 161 F.2d at 465), and a dissent from Judge Augustus N. Hand, 161 F.2d at 465-66. *Fried* antedates *Calandra, supra*, in which the Supreme Court specifically held that the Fourth Amendment exclusionary rule did not apply to grand jury proceedings; and post-*Calandra* citations of *Fried* have dealt with Rule 41(e) motions "prior to any suggestion of criminal proceedings," see, *e.g., Richey* v. *Smith*, 515 F.2d 1239, 1243 n.10, 1245 (5th Cir. 1975). The Second Circuit's current, post-*Calandra* view with respect to pre-indictment Rule 41(e) motions is expressed in *Standard Drywall, supra*. I cannot

regard Judge Frank's reasoning in *Fried* as dispositive on the point.

Limiting my ruling to the facts of this case, I hold that where a company has become the target of an ongoing grand jury investigation as the result of the revelations of Government informants, and during the pendency of the grand jury investigation documents belonging to the target are seized pursuant to a search warrant, consideration of the target's Fourth Amendment claims must be deferred to a motion to suppress evidence under Rule 12, "in the absence of seizure of some unique property or privileged documents," *Standard Drywall, supra*, at slip op. 689 n.2, circumstances not here present.

CONCLUSION

The motions for relief under Rule 41(e), F.R.Crim.P., are denied, without prejudice to a later assertion of the underlying Fourth Amendment claims if the grand jury returns an indictment.

It is So Ordered.

Dated: New York, New York
January 28, 1982

CHARLES S. HAIGHT, JR.
U.S.D.J.

FOOTNOTES

1. The rule provides:

   "Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

2. Neither party referred the Court to *Standard Drywall*. I intend no criticism of counsel. The case had not been decided when the original briefs were filed, and was handed down the same day this Court asked counsel to address other questions.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
M9-150

IN THE MATTER OF THE APPLICATION OF SENTINEL GOVERNMENT SECURITIES AND SENTINEL FINANCIAL INSTRUMENTS TO DIRECT THE RETURN OF SEIZED PROPERTY.

MEMORANDUM OPINION AND ORDER

HAIGHT, *District Judge:*

In considering this motion under Rule 41(e), F.R.Crim.P., for the return of allegedly illegally seized property, I conclude that further briefs are required.

The generality of the warrants gives rise to substantial questions under such cases as *United States* v. *Marti,* 421 F.2d 1263 (2d Cir. 1970), *cert. denied,* 404 U.S. 947 (1971); *Application of Lafayette Academy, Inc.,* 610 F.2d 1 (1st Cir. 1979), and *United States* v. *Abrams,* 615 F.2d 541 (1st Cir. 1980). It appears undisputed that, in response to those warrants, the agents seized literally all of SGS's and SFI's files.

The Government defends the warrants and the seizures on the basis of Agent McLaughlin's affidavit, heretofore sealed, which is said to support "a finding that for the time delineated by the warrants SFI and SGS were engaged in an almost solely criminal operation of which almost every transaction was fraudulent." Brief at 12. Therefore, the Government argues, seizure of all the business records was

justified under *National City Trading Corp* v. *United States*, 635 F.2d 1020 (2d Cir. 1980), and *United States* v. *Brien*, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980).

National City and *Brien* both involved "boiler room" sales operations, dealing in silver and commodity options respectively. In *Brien* the First Circuit upheld a warrant authorizing seizure of "most of the business records" of a company called Lloyd, Carr, 617 F.2d at 306, stating at 309 n.11:

> "This was not a case in which the suspected crime may have been reflected in a segregable class of records. Cf. In re Lafayette Academy, 610 F.2d 1 (1st Cir. 1979) (Federal Insured Student Loan Program-related records); VonderAHE v. Howland, 508 F.2d 364 (9th Cir. 1974) (yellow sheets and green cards maintained by dentist as records for patients whose payments were not reported as income to the IRS). Rather, the affidavit showed that Lloyd, Carr was engaged in the very specialized business of selling London commodity options and that its entire operation was a scheme to defraud investors."

In *National City* the Second Circuit relied upon *Brien* in upholding a comparable warrant, based upon an affidavit establishing "probable cause to believe that NCTC's business was permeated with fraud." 635 F.2d at 1026.

In the case at bar, I have read the agent's affidavit *in camera*. It establishes probable cause to believe that, in 1978 and succeeding years, SFI has engaged in a widespread false trading operation, manufacturing documents so that customers could reduce their income tax liability by means of apparent "straddles." Probable cause also appears to believe that, since its formation in June of 1980, SGS engaged in comparable falsification of documents in order to provide tax losses to its limited partners.

The affidavits submitted on the motion appear to show that SFI and SGS were engaged in business activities other than those directed toward tax evasion or deferment, as described in the affidavit underlying the warrant; and that files relating to other activities were in fact seized. The following questions arise:

(1) To justify seizure of all a company's business records must the supporting affidavit demonstrate probable cause to believe that the company's "entire operation was a scheme to defraud," *Brien, supra,* or that the operation was "permeated with fraud," *National City, supra*?

(2) If so, does the affidavit in this case rise to that level? In other words, does the affidavit in this case demonstrate, as the Government claims, that SFI and SGS "were engaged in an almost solely criminal operation of which almost every transaction was fraudulent"?

(3) Or, on the other hand, is it sufficient to demonstrate (as the present affidavit clearly does) probable cause to believe that significant aspects of a company's operations are fraudulent? And if it be said that the Government's duty, in such circumstances, is to segregate in the warrant those classes of documents which reflect suspected crime:

> (a) to what extent was that done in the present warrant?
>
> (b) to what extent do practical considerations give the agents flexibility in seizing documents under the warrant?

On this point, note that the Second Circuit in *National City,* at 1027, cited with approval Judge Campbell's concurring opinion in *Abrams,* at 615 F.2d 550-51. "The time may have come," said Judge Campbell in *Abrams,* "to stop quoting the phrase from *Marron* v. *United States,* 275 U.S. 192, 196 (1927),"

that "nothing is left to the discretion of the officer executing the warrant."

These are not the only questions raised by the briefs, but I regard them as significant, and request further briefs of counsel. Counsel for SFI and SGS are under the disadvantage of not having read the agent's affidavit. While they ask that the affidavit now be unsealed, I decline to do at this time. Counsel must do the best they can. The affidavit recites detailed information given by an informant. The matter is complex. I agree with the Government that revealing these details to the targets at this time could hinder the grand jury investigations.[1] I have attempted to summarize the affidavit in such a way to permit counsel further to address the issues.

The parties are directed to serve and file further briefs within ten (10) days of the date of this order.

IT IS SO ORDERED.

Dated: New York, New York
January 5, 1982

CHARLES S. HAIGHT, JR.
U.S.D.J.

FOOTNOTES

1. In moving for the unsealing of the agent's affidavit, SFI and SGS rely upon *In re Sealed Affidavit(s) to Search Warrants Executed on February 14, 1979,* 600 F.2d 1256, 1258 n.3 (9th Cir. 1979) *(per curiam),* on remand, Misc-Civ-722 (D.Nev. October 3, 1979), and *In re Search Warrant for Second Floor Bedroom,* 489 F.Supp. 207 (D.R.I. 1980). In both cases, the district judge was persuaded that no risk of disclosure was presented. "Surely the long period of time that these affidavits have been sealed has eroded the factors constituting the Government's fear that the investigation would be jeopardized by

disclosure." *Sealed Affidavit(s), supra,* at slip op. 3. "Furthermore, this Court's preliminary statement in this matter, issued April 8, 1980, indicated that a decision would not be reached for two to four weeks, which gave the Government ample opportunity to call any witnesses who might be particularly likely to alter their testimony." *Second Floor Bedroom, supra,* at 212. The facts of the case at bar do not admit of such reassurance. Presumably with these factors in mind, Judge Goettel sealed the affidavit for four months. I decline to disturb that ruling.

Supplemental Brief

81-1874

No.:

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

SENTINEL GOVERNMENT SECURITIES and
SENTINEL FINANCIAL INSTRUMENTS,

Petitioners,

–against–

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR EXPEDITED CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1981

No.:

SENTINEL GOVERNMENT SECURITIES and
SENTINEL FINANCIAL INSTRUMENTS,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR EXPEDITED CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

Petitioners, by their counsel, respectfully move the Court for an order expediting consideration of their petition for a writ of certiorari so that it may be considered by the Court together with the petition for certiorari in *Standard Drywall, Inc.* v. *United States*, Dkt. No. 81-1492 (petition filed Feb. 4, 1982). Petitioners are advised that the petition in the

Standard Drywall case is likely to be considered by the Court on April 16, 1982. As grounds for this motion, petitioners' counsel states:

1. The instant petition presents only one question, and it is identical to the one presented by *Standard Drywall*: Is the denial of a motion for return of property, made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure and denied prior to the institution of formal criminal proceedings against the movant, immediately appealable as a final decision under 28 U.S.C. § 1291? *Standard Drywall* was decided by the United States Court of Appeals for the Second Circuit on January 5, 1982; petitioners' appeal to the Second Circuit in the instant case was dismissed on April 7, 1982, on the authority of *Standard Drywall*. Accordingly, it is appropriate for the two cases to be considered together.

2. The United States of America is respondent on the instant petition, as it is in *Standard Drywall*. The government filed, on or about March 26, 1982, its brief in opposition to the petition in *Standard Drywall*. The arguments that it made in that brief are presumably the same as those it would make in response to the instant petition, which raises precisely the same issue. Petitioners have read the government's brief in opposition in *Standard Drywall* and have responded to the arguments made therein in their petition in this case.

3. The Court may get a truer picture of the number of litigants affected by the issue raised herein and in *Standard Drywall* if there are before the Court, at the same time, two petitions arising from the same circuit within a three-month period involving the same question. It would be a waste of the Court's time and resources to consider the petitions separately.

WHEREFORE, petitioners pray that the Court order that the instant petition for a writ of certiorari be considered together with the petition in *Standard Drywall*.

Respectfully submitted,

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Opposition

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No. 81-1874

In the Supreme Court of the United States

OCTOBER TERM, 1981

SENTINEL GOVERNMENT SECURITIES AND
SENTINEL FINANCIAL INSTRUMENTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1874

SENTINEL GOVERNMENT SECURITIES AND
SENTINEL FINANCIAL INSTRUMENTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, subjects of an ongoing grand jury investigation in the Southern District of New York, seek review of the holding of the Second Circuit that the denial of their motion for the return of seized property under Fed. R. Crim. P. 41(e) is not an appealable order.

1. Petitioners' claim is indistinguishable from that presented by the pending petition in *Standard Drywall, Inc.* v. *United States,* No. 81-1492. Sentinel Government Securities (SGS) and Sentinel Financial Instruments (SFI) are brokers and dealers in money market instruments and government securities. Both are targets of a grand jury investigation currently pending in the Southern District of New York. The grand jury is investigating the possibility that SFI engaged in a widespread false trading operation,

manufacturing documents so that customers could reduce their income tax liability by means of apparent "straddles." SGS is the subject of an inquiry into comparable falsification of documents in order to provide tax losses to its limited partners. On November 17, 1981, IRS agents executed search warrants and removed numerous files from the SFI and SGS offices (Pet. App. B-2). The warrants were issued on the basis of an affidavit reciting detailed information given by an informant; the affidavit has been sealed, and the district court, after reading it in camera, concluded that disclosure of its contents would hinder the grand jury's investigation (*id.* at C-2, C-4). The government offered to provide petitioners with copies of all the seized documents (*id.* at B-5). The district court found that that offer "has been at least partially implemented. It also appears from the record that although SFI and SGS understandably profess difficulties in doing so, the companies have in fact been able to continue doing business" (*ibid.*).

2. Petitioners moved in the district court, pursuant to Fed. R. Crim. P. 41(e), for an order directing the return of the property seized under the warrants. They claimed that the warrants were too general in scope and therefore violated their rights under the Fourth Amendment. On January 28, 1982, the district court denied the motion "without prejudice to a later assertion of the underlying Fourth Amendment claims if the grand jury returns an indictment" (Pet. App. B-9). The court concluded that SFI and SGS were targets of the pending grand jury investigation, and that the property seized was neither unique nor privileged. Consequently, since the government had offered to provide copies of the seized documents during the pendency of the investigation, the court found that the interim harm to petitioners was not irreparable, and declined to grant immediate return of the property.

The court of appeals dismissed the appeal (Pet. App. A-1 to A-2) for lack of jurisdiction, on the authority of *Standard Drywall, Inc.* v. *United States*, 668 F. 2d 156 (2d Cir. 1982), petition for cert. pending, No. 81-1492. It held that a pre-indictment denial of a Rule 41(e) motion brought by the target of a grand jury investigation was not an appealable order.

3. Like the petitioner in *Standard Drywall*, petitioners in this case contend that there is a split of authority among the courts of appeals concerning the appealability of the denial of a Rule 41(e) motion made by the target of a grand jury investigation (Pet. 8-12). In fact, petitioners' case itself simply provides further support for the obvious point made by the government in its Brief in Opposition to the *Standard Drywall* petition: none of the 10 courts of appeals that have addressed the issue has permitted an appeal from a Rule 41(e) suppression motion while a grand jury was sitting to consider the seized evidence as part of its investigation (81-1492 Br. in Opp. 6-7). Petitioners' contrary assertion hangs by one slender thread: their parsing of the three opinions written by a panel of the Seventh Circuit in *United States* v. *One Residence & Attached Garage*, 603 F. 2d 1231 (1979). Petitioners naturally attempt (Pet. 11) to draw the Court's attention to the opinion of Judge Swygert, concurring in part and dissenting in part. Judge Swygert did indeed say that the pendency of a grand jury investigation did not affect the appealability of the district court's order. But he also characterized that conclusion as "my analysis of the questions there involved." 603 F. 2d at 1235. Judge Bauer, author of the lead opinion, held that the movant could appeal with regard to the cash seized since "the government ha[d] failed to show any possible connection between it and any alleged criminal act of the appellant." *Id.* at 1234. But, on the other hand, Judge Bauer also said, "on the issue of the sufficiency of the showing of a criminal investigation *in esse* and the nexus of the [other] property

seized to the investigation, I take comfort and read the approval of my Brother Wood." *Ibid.* Those two questions are, of course, the test of appealability laid down in *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962). And Judge Wood stated, on the authority of *DiBella*, that the appeal should be dismissed. 603 F. 2d at 1237-1240.

Though the various opinions in *One Residence & Attached Garage* do not make the case a model of clarity, they provide no support for petitioners' argument that "[t]he courts of appeals have divided on the meaning of 'criminal prosecution *in esse*' " (Pet. 9). If anything, the opinions suggest that the Seventh Circuit would probably agree with the Second Circuit if presented with a case like that of petitioners here. In any event, for this Court's purposes, recognition of an inter-circuit conflict requiring resolution should await further clarification of the Seventh Circuit's position.

4. Petitioners assert (Pet. 14-15) that "the efficiency of the grand jury and trial process is likely to be fostered rather than hindered by permitting an immediate appeal," since a determination "that a search was illegal may cause the government not to seek an indictment in a case that ultimately could not result in a conviction * * *." Petitioners also argue that postponement of appellate review will subject them to the irreparable harm of an indictment founded upon illicit evidence (*id.* at 16). The latter concern is of limited force in the wake of *United States* v. *Calandra*, 414 U.S. 338 (1974). Moreover, protection for the interests advanced by petitioners is in part the purpose of Rule 41(e), itself, and of Fed. R. Crim. P. 12(b)(3), which in appropriate cases permit the district court to order suppression of illegally seized evidence both during and after grand jury proceedings. The question here is not whether the government should be permitted to seek an indictment or go to

trial in reliance on inadmissible evidence, but whether the time of our 12 courts of appeals should be in part devoted to review of interlocutory orders denying suppression and return of property constituting evidence that has been or will be considered by a sitting grand jury. None of the courts of appeals has concluded that such immediate appellate review is proper in those circumstances. There is no reason for this Court to review their conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982

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Petitioner's Reply Brief

Supreme Court, U.S.
FILED
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No.: 81-1874

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-against-

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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IN THE

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FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Petitioners Sentinel Government Securities and Sentinel Financial Instruments (collectively "Sentinel") received, on April 14, 1982, the memorandum of the United States in opposition to their petition for a writ of certiorari seeking review of the Second Circuit's holding that the denial of a Rule 41(e) pre-indictment motion for the return of seized property is not an appealable order. This memorandum is respectfully submitted in reply to the government's memorandum.

As in its brief in opposition to the pending petition in Standard Drywall, Inc. v. United States, No. 81-1492, the government, in the case at bar, continues to maintain that there is no split of authority among the courts of appeals because no court of appeals "has permitted an appeal from a Rule 41(e) suppression motion while a grand jury was sitting to consider the seized evidence as part of its investigation" (Resp. Memo 3). In Sentinel's petition for certiorari, we pointed out that an examination of the Sixth, Eight and Tenth Circuit authorities -- which, unlike the Second Circuit in the case at bar, permitted an immediate appeal from the denial of a pre-indictment Rule 41(e) motion made by a subject of a criminal investigation -- does not reveal, one way or the other, whether a grand jury was sitting in connection with the criminal investigations pending in those cases. Faced with such a response, one would imagine that the government would disclose the basis for its statement that, in fact, no grand jury was sitting in Coury v. United States, 426 F.2d 1354, 1355 (6th Cir. 1970); United States v. Alexander, 428 F.2d 1169, 1171 (8th Cir. 1970); and Gottone v. United States, 345 F.2d 165 (10th Cir.), cert. denied, 382 U.S. 901 (1965).* It has not done so. Consequently, there is no basis for

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* It is not disputed by the government that a grand jury was sitting in United States v. One Residence & Attached Garage, 603 F.2d 1231 (7th Cir. 1979), where an immediate appeal was permitted. The government devotes much of its memorandum to an effort to distinguish that case, finally concluding that it is not "a model of clarity" (Resp. Memo 3-4). It fails to cite, much less discuss, the Sixth, Eighth and Tenth Circuit authorities relied on in the petition.

this Court to credit the government's statement that no grand jury was sitting in those three cases, and the factual underpinning of the government's claim of no conflict among the circuits is non-existent.

In Sentinel's certiorari petition it was also pointed out that, quite apart from whether a grand jury was sitting in the Sixth, Eighth and Tenth Circuit cases, nowhere did the opinions in those cases draw the distinction that the government relies on in this Court -- nowhere did they state that they permitted an immediate appeal because no grand jury was sitting. They never discussed that question. Rather, they explicitly stated that because no criminal charges had been filed against appellants in those cases -- because there was no arrest, arraignment, information or indictment and, consequently, no "criminal prosecution in esse" within the meaning of DiBella v. United States, 369 U.S. 121, 131-32 (1962) -- an immediate appeal was permitted.*

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* Thus, the Sixth Circuit stated in Coury v. United States, supra, at 1355:

> . . . since no criminal charges have been filed against appellant, the motion to return the seized property is an independent proceeding from which an appeal may be taken. DiBella, supra, at 131-132, 82 S.Ct. 654.

In United States v. Alexander, supra at 1171, the Eighth Circuit stated:

> Appellants have been neither arrested nor arraigned. Neither does the record show that they are under indictment or information for the commission of any crime. In short, the order denying their claim for

(fn. continued)

This position is directly contrary to that of the Second Circuit in Standard Drywall, as the Second Circuit itself expressly recognized in its Standard Drywall opinion (another fact which the government chooses to ignore). In view of the foregoing, whatever one's position may be as to the merits of the ultimate issue in question*, the government's refusal in this Court to recognize this clear split among the circuits -- indeed its denial that such a

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(fn. continued)

> relief from the alleged illegal search and seizure was independent of a criminal prosecution in esse. Accordingly, we believe that we have jurisdiction to hear the appeal.

In Guttone v. United States, supra at 165, the Tenth Circuit stated:

> Appellant is not under arrest nor is an information or indictment outstanding against him. Since the motion is not made in nor dependent upon a case in esse, the District Court's denial of such motion is an appealable order, Go-Bart Importing Co. v. United States, 282 U.S. 344, 365, 51 S.Ct. 153, 75 L.Ed. 374, and within the exception set forth in DiBella v. United States, 369 U.S. 121, 131-132, 82 S.Ct. 654, 7 L.Ed.2d 614.

* The government states that the "question here is . . . whether the time of our 12 courts of appeals should be in part devoted to review of interlocutory orders denying suppression and return of property constituting evidence that has been or will be considered by a sitting grand jury" (Resp. Memo 4-5). Even if one accepts that as a fair statement of the question on the merits -- which petitioners do not -- there should at least be one answer for all 12 courts of appeals.

plit exists -- is nothing short of disingenuous. Certiorari hould be granted.

Respectfully submitted,

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